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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-71

CARLOS BOUTUREIRA, JOSEPH CHIAPETTI and ANDRES SANCHEZ,

Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Preliminary Statement

Petitioners seek a writ of certiorari to review orders of the Supreme Court of the State of New York, Appellate Division, First Department, dated March 13, 1979. Those orders unanimously affirmed, with an opinion, judgments of the Supreme Court, New York County, rendered May 12 and June 28, 1978. By those judgments, Joseph Chiapetti and Andres Sanchez were convicted after a jury trial of Manslaughter in the First Degree (New York Penal Law §125.20), two counts of Assault in the First Degree (New

York Penal Law §120.10), two counts of Assault in the Second Degree (New York Penal Law §120.05), Riot in the First Degree (New York Penal Law §240.06) and Conspiracy in the Second Degree (New York Penal Law §105.10). Carlos Boutureira was convicted of Assault in the First Degree, two counts of Assault in the Second Degree, Riot in the First Degree and Conspiracy in the Third Degree (New York Penal Law §105.15). Chiapetti and Sanchez were sentenced to 4 to 12 and 2½ to 7½ years, respectively, on the manslaughter and first degree assault counts and additional concurrent indeterminate terms on the other counts. Boutureira was sentenced to 3⅓ to 10 years on the first degree assault count and additional concurrent terms on the other counts. Each of these sentences is now being served. By orders dated April 17, 1979, leave to appeal the judgments of the Appellate Division to the New York Court of Appeals was denied. Reconsideration of these denials was denied Chiapetti and Sanchez by orders dated May 8, 1979.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Statement of the Case

On September 7 and 8, 1976, petitioners planned, organized and executed a vigilante action designed to drive black people out of Washington Square, a park located in the heart of New York's Greenwich Village. Armed with bats, pipes, chains and clubs, petitioners and more than 50

other youths, almost all of them white, swept through the park attacking blacks and dark-skinned hispanics. In the assault, a college student was killed, an ex-serviceman lost the sight of one eye, and many other persons suffered injuries that required medical treatment at a nearby hospital.

The three petitioners and six other defendants were each indicted for manslaughter, assault, conspiracy and riot and were brought to trial in January, 1978. Six days of jury selection were completed on January 27th. Nearly three weeks later, on Wednesday, February 15th, the first day of the third week of testimony after a five-day weekend, the publication of three newspaper articles concerning "missing" witnesses was brought to the court's attention. One article appeared in that day's *Daily News*. The others were in two different editions of the past Saturday's *New York Times*. All three were short articles on the inside pages of the papers (1281).* Mr. Direnzo, counsel for co-defendant Andriani, proposed that each of the jurors be interviewed individually by the court "to ascertain whether any of them have read these articles * * * [the court] would completely supervise [the interview] without counsel participating except to be present" (1277). The court decided instead to question all the jurors at once, interviewing only those who had read or seen "anything about this case" (1281). Mr. Direnzo objected to this procedure (1284). Nonetheless, when the jury arrived, the court asked whether any jurors had seen or read any of the three articles. Three jurors indicated they had seen something. Of the three, one juror said he saw a headline. Another said he saw the "article that was pointed out by [juror] Carrington"

* Numerical references are to the minutes of petitioners' trial.

(1291-92). No juror indicated he had actually read any of the articles. The trial then continued with the taking of testimony on the People's case.

Later that same day, during the lunchtime recess, a fourth article, in the *New York Post,* headlined "Village Riot Witnesses Vanish—D.A. Tells of Threats" came to the court's attention. When the trial resumed, the court on its own initiative announced its intention, in view of this last article, to individually interview all the jurors about each of the four articles published since the preceding Friday (1406). Although the court made it clear that neither the district attorney nor defense counsel would be permitted to attend the examination, each party was to be provided with a transcript of the examination as part of the daily copy already being supplied (1402). No defense counsel objected to this procedure. The prosecutor, however, suggested the court instruct each juror not to buy that evening's edition of the *New York Post* (1407). The court agreed (1407) and the trial continued.

When the afternoon of testimony concluded, the court admonished the jurors, before interviewing them individually in chambers, not to read that evening's *New York Post* (1478). Mr. Degen, counsel for petitioner Boutureira, however, asked the court to repeat the admonition, individually, in the course of the examinations (1479). The court promptly agreed and the specific instruction not to read that evening's *Post* was repeated to each juror. This was given in addition to a general admonition against reading or listening to any media account of the trial that the court delivered at the opening of trial (8, 11) and at the conclusion of each morning and afternoon of testimony

(161, 387, 601, 784, 898-900, 1050, 1189, 1240-41, 1478, 1714, 1927, 2026, 2140-41, 2145, 2286, 2393, 2605, 2845, 3079, 3494, 3649, 3854, 4095, 4175).

In examining each juror that afternoon, the court asked whether he or she had heard of or read any of the articles or headlines referred to. Although no juror had read any articles, six had seen or heard of headlines. Only two of these jurors, however, remembered the substance of the headlines (Umbaugh: 1495; Ellis: 1497). Another could recall but a single word: "Village" (Wilson: 1481). The remaining jurors had only a recollection that the headlines referred to missing witnesses (Broderick: 1486; Kerrington: 1489; Barnes: 1493).

The following day, all defense counsel, furnished with the minutes of the court's examination, moved for a mistrial based on the alleged inadequacy of the court's inquiry as well as the absence of counsel (1611, 1613). In support of their joint application, counsel pointed to page 1481 of the transcript. On that page, the forelady, Ms. Wilson is reported to say that one of the jurors read aloud the *Post* headline of February 15th. Counsel argued that because of this statement, the court should have inquired who read that headline aloud, who owned the issue of the paper from which it was read, and what effect the headline had, if any, on each juror. In addition, counsel wanted to know whether each juror had received other information about the trial from any other source (1609, 1611). The court denied the motion for a mistrial but agreed to re-examine Ms. Wilson. The court also agreed that if it determined from that inquiry that someone had read the headline aloud in the jury room, it would then re-examine all of the jurors, again

making transcripts available to the defense (1610). The People suggested that the defense be allowed to submit written questions which the court in its discretion might ask during the examination. The court adopted this suggestion with the consent of all parties (1619) and questions were subsequently submitted (2352, 3509).

The next day, Friday, February 17th, the court interviewed Ms. Wilson and then examined another juror, Mr. Umbaugh. Both Wilson and Umbaugh described what had happened in the jury room on February 15th: One of the jurors had brought in a copy of the *New York Post*. A second juror was reading it when Umbaugh noticed the headline. Umbaugh warned that juror not to read any further but then proceeded to read the headline himself, aloud, as other jurors shouted that he be quiet. There was no discussion of the headline, only talk of Umbaugh's poor judgment in having read it (Wilson: 1750-53; Umbaugh: 1761-64).

Ms. Wilson stated she had no present recollection of the content of the headline (1757). Mr. Umbaugh, a former journalist (1495), had given the headline serious thought and then dismissed it as unrelated to the case (1766). Both assured the court that the headline would in no way affect their view of the case (Wilson: 1758; Umbaugh: 1765). The court cautioned both to speak to no one about their interview, recalling Wilson for that purpose (Umbaugh: 1768; Wilson: 1769). On his own, Umbaugh returned to the robing room to inform the judge that he had, in fact, never read aloud that part of the headline concerning threats. He had only read the part about missing witnesses (1773-74).

The trial was adjourned for a three-day weekend and resumed on Tuesday, February 21st. On that date, the court requested counsel to postpone for a day whatever applications counsel wanted to make concerning Friday's examination of jurors Umbaugh and Wilson (2346). On Wednesday, the defense requested further examination of all the jurors, in the presence of counsel, to determine which jurors heard the headline, what effect it had on them and whether they were aware of any other accounts of the trial (2346, 2348). Yet Mr. Ferrigno, counsel for acquitted defendant Areena, stated: "Essentially, all of my questions were asked except the one that is propounded by Mr. Cohen [counsel for petitioner Sanchez]" (2352).* The court agreed to further interviews but indicated that neither the prosecutor's presence nor that of defense counsel would be permitted. The court stated, "I think that might be coercive and more prejudicial than the matter is now" (2347).

The following day, Wednesday, February 23d, the court met for the second time with all the jurors individually and determined that the newspaper which had been read aloud belonged to juror Uram (2401). The court impressed upon each juror the confidential nature of the examination. One juror said he had not been present when the headline was read (Young: 2437). Seven jurors were present but did not remember what happened (Dwyer: 2398; Carrington: 2411; Hernandez: 2415; Olsen: 2419; Uram: 2435; Otway: 2435; Schaeffer: 2440). Six others

* The record establishes that the substance of Mr. Cohen's question was clearly and repeatedly asked. *See* pp. 9-10, *infra*. Petitioners on appeal and in their application before this Court have never contended otherwise.

had a vague recollection of the particular headline (Horner: "Something about Village Riot" (2402); Broderick: "* * * something about a witness disappearing—I don't remember his exact words, but I know it was something about that" (2406); Fleming: "* * * I heard a phrase, just one phrase * * * A missing witness, and that's absolutely all I know" (2421); Barnes: "* * * it said something about one of the witnesses had fled or left town, something to that effect" (2423); Cooke: "* * * he made like a casual remark, you know, well everybody knows that the headline said, you know, witness vanishes" (2428); Ellis: "* * * the Post carried a headline that witnesses had disappeared, or maybe a witness had disappeared" (2430)).

The court asked each juror if he or she had drawn any inferences from the headline or had in any way been affected by it. Jurors Horner (2403), Broderick (2407), Carrington (2413), Hernandez (2417), Fleming (2422), Cooke (2428-29) and Ellis (2431-32) indicated that the headline had no effect upon them and that they could disregard it and judge the case solely on its merits. Jurors Dwyer (2397) and Olsen (2419), although not asked directly what effect the headline had on them, indicated that they could not recall the contents of the headline. Alternate jurors Uram (2434), Otway (2435-36), Young (2438) and Schaffer (2440) had no recollection of the headline to disregard. Although jurors Wilson and Umbaugh were not, on the previous Wednesday, asked if they had drawn an inference from or had been affected by the headline, in their separate interviews with the court on the Friday before, they each indicated they would not be influenced (Wilson: 1758; Umbaugh: 1765-68).

The court also asked the jurors whether they had seen or heard anything else connected with the case. Three jurors said they had (Broderick: "* * * something about witnesses not talking" (2407); Carrington: "* * * something about searching for ten witnesses, or something to that effect" (2412); Umbaugh: "I saw seven words * * * I saw the Village Riot, and I said, oh oh. I ripped it out. I didn't get all of it * * * there was a little hunk down where I saw unemployed from Radio City Music Hall, and I figured they must be talking about Rizzo, and that's all" (2425-2426)). No juror, however, had read any article or spoken to anyone about the case. Four jurors had since been avoiding newspapers entirely (Horner: 2404; Umbaugh: 2426; Otway: 2436; Wilson: 2442). Three jurors had someone read their paper beforehand and remove any articles referring to the case (Olsen: 2420; Cooke: 2429; Ellis: 2432-33). Two jurors, when warned by others of the presence of articles in the papers, scrupulously avoided those articles (Barnes: 2424; Schaeffer: 2440-41). One juror would skip articles he believed could in any way be related to the case (Carrington: 2412).

Eight days later, on Thursday, March 2d, Mr. Ferrigno, counsel for acquitted co-defendant Areena, moved for a mistrial, claiming that the court's second examination of the jurors was again inadequate "concerning the effect, if any, this [headline] has on [the jury's] present disposition toward the defendant" (3508). Mr. Ferrigno was joined in that motion by all other defense counsel (3509) and the following exchange occurred:

> The Court: I don't recall whether or not we marked your questions, but I think you concede, Mr.

Ferrigno, that I asked in substance all of your questions.

Mr. Ferrigno: All of my questions, except the one Mr. Cohen and I had (3509).

The court decided to let the record speak for itself and denied the motion (3509-10). That written question, Court Exhibit 18, shows that the court was correct and the substance of the question clearly asked. Indeed, petitioners have never contended otherwise. That exhibit reads:

> As a result of reading or learning about the newspaper articles as to missing witnesses who were scheduled to appear for the prosecution, do you have any feelings of prejudice against the defendants?

Trial continued for another week and one-half of testimony, followed by a week of summations and the court's charge. In its charge, the court cautioned the jurors "not [to] consider in [their] determination of guilt of any defendant * * * anything that [they] may have read or heard other than the testimony given in this courtroom." The court further cautioned, "Do not permit any extraneous matters of any kind to effect your judgment. Concentrate on the evidence to the complete exclusion of anything else" (4384). The court also explained the legal principles relevant to conspiracy and criminal responsibility based upon a person's own conduct (intentional assault) and the conduct of another (felony assault [akin to felony murder] and accomplice liability). Two of the 36 questions, asked by the jury illustrate the care with which the jury strove to apply these rules of law to the facts in evidence.

> If a defendant is found guilty of conspiracy in the second or third degree and riot, [and] someone is killed in the course of this action, what obligation is there under the law, if any, to find that defendant guilty of manslaughter in the first degree? (4502-03).

> Man A goes into the park during a riot and inflicts serious physical injury on Man X; If Man B inflicts physical injury on Man Y under what circumstances can we find Man A guilty of the assault on Man Y with intent? (4577).

After six days of deliberation, petitioners Chiapetti and Sanchez and co-defendant McLamb were found guilty of all counts that the court submitted to the jury. Petitioner Boutureira and co-defendants Andriani and Doyle were found guilty of some submitted counts and not guilty of others. The remaining three defendants were found not guilty of all submitted counts.

In reaching this verdict the jury relied upon evidence that showed Chiapetti was the leader and major organizer of the riot. He recruited in the streets and parks of Greenwich Village and arranged for the production and concealment of weapons. An hour before the riot, he directed the rioters to march in small squads to Washington Square Park and there reassemble. At the edge of the park, from the top of a parked car, Chiapetti rallied the rioters to surge forward. He then ran into the park and attacked black people. When the melee ended, Chiapetti urged the rioters to throw away their weapons and flee.

The evidence also established that Boutureira acted as a lieutenant to Chiapetti. He carried a weapon, encouraged others to take up weapons, and helped Chiapetti rally the mob forward at the edge of the park. He was also seen swinging a bat inside the park.

As for Sanchez, the evidence established that the riot was, in part, undertaken to avenge a beating Sanchez had suffered at the hands of a black drug dealer in Washington Square Park after a narcotics transaction had soured the evening before. The evidence established that Sanchez helped recruit and organize the attack, that he returned to Washington Square Park, armed, moments before the riot began and scouted the park for the drug dealer who beat him.

POINT I

No substantial constitutional question is presented by the trial court's discretionary decision to individually examine jurors, *in camera*, about newspaper publicity during trial.

Petitioners challenge the procedure used by the trial court to examine members of the jury about exposure to a single newspaper article published during the trial. Although each juror was examined individually, the examinations were transcribed and immediately made available to defense counsel, and counsel were allowed to submit written questions which were asked by the court, petitioners contend that due process was denied and the Sixth Amendment right to the effective assistance of counsel was violated by the physical exclusion from each examination of nine lawyers and nine defendants.

Notably, at trial, petitioners never requested to be present during the court's examinations. This Court, moreover, has never held that the presence of defendant is a per se constitutional requirement at such a proceeding. Due process grants a defendant only the right to

be present "where his absence might frustrate the fairness of the proceedings * * *." *Faretta* v. *California*, 422 U.S. 806, 819 n. 15 (1975); *see Snyder* v. *Massachusetts*, 291 U.S. 97, 106-08 (1934). Indeed, New York case law is substantially in accord. Citing *Snyder* v. *Massachusetts*, *supra*, the New York Court of Appeals has held that a defendant's presence is required only "where his absence would have a substantial effect on his ability to defend." *People* v. *Mullen*, 44 N.Y.2d 1, 5 (1978) (affirming conviction where trial court questioned juror *in camera* about whether juror's knowledge of defendant would influence his verdict). Applying this standard and citing *People* v. *Mullen*, *supra*, New York's Appellate Division rejected petitioners' contention that due process had been denied by petitioners' absence from the court's inquiry (Petitioners' Appendix at 2a). Since no claim is made that that standard does not comport with the standards established by this Court, no important purpose would be served by granting certiorari merely to review the factual application of that standard.

As for the physical absence of defense counsel from the trial court's examinations, petitioners stand on no firmer ground. The Sixth Amendment assures the defense "the opportunity to participate fully and fairly in the adversary fact finding process." *Herring* v. *United States*, 422 U.S. 853, 858 (1975). Again, no claim is made that New York courts do not follow this principle. Indeed, the New York Court of Appeals will reverse a conviction if the opportunity to defend fully and fairly has been denied. *See, e.g., People* v. *DeJesus*, 42 N.Y.2d 519 (1977) (trial judge repeatedly and unnecessarily interfered with defense counsel's conduct of the defense). Thus, no pur-

pose would be served by granting certiorari merely to undertake a factual review of the adequacy of counsel's opportunity to participate effectively in the trial court's inquiry.

In any event, the record confirms the conclusion of the New York Appellate Division that there was "even-handed fairness" in the trial court's inquiry (Petitioners' Appendix at 3a) and further, that counsel, despite physical absence from the inquiry, participated fully and effectively in it. Defense counsel were fully aware of the time, place and purpose of each examination before the examination took place. Counsel submitted questions to be asked by the trial court, all of which, it is undisputed, were in substance asked. Transcripts of each examination were furnished defense counsel as soon as the examination was concluded and transcribed. Each time counsel, after reviewing a transcript, requested a further examination, such examination was conducted. Thus, petitioners were in no sense the victims of *ex parte* judicial action. *Cf. United States* v. *United States Gypsum Co.*, 438 U.S. 422, 461-62 (1978) (judge meets privately with jury foreman and delivers instruction about jury's obligation to render verdict which although recorded, was not made available to the defense at trial); *Rogers* v. *United States*, 422 U.S. 35 (1975) (trial judge responds to note from deliberating jury without notice to either party); *Remmer* v. *United States*, 347 U.S. 227 (1954) (judge and prosecutor, without notice to defense, initiate FBI investigation of third party contact with juror).

Furthermore, provided the court's inquiry is adequate to establish that defendant has not been prejudicial by extra-

judicial influence during trial, the Circuit Courts of Appeal are unanimous in their view that convictions should not be overturned simply because the inquiry was conducted *in camera*. *See United States* v. *Larkin*, 417 F.2d 617 (1st Cir. 1969) (jurors interviewed individually *in camera* after defendant is seen in handcuffs), *cert. denied*, 397 U.S. 1027 (1970); *United States* v. *Hockridge*, 573 F.2d 752, 756 (2d Cir.) (jurors interviewed individually *in camera* after one juror, during trial, reported that several others remarked defendants were guilty), *cert. denied*, —— U.S. ——, 99 S.C. 86 (1978); *Polizzi* v. *United States*, 550 F.2d 1133, 1137 (9th Cir. 1976) (jurors interviewed individually *in camera* about publicity during trial); *Bacino* v. *United States*, 316 F.2d 11 (10th Cir.) (juror interviewed *in camera* after he objects to noncustodial status of defendant upon seeing defendant at liberty at courthouse door), *cert. denied*, 375 U.S. 831 (1963). Although the Fourth Circuit, in dictum, has expressed its disapproval of defense counsel's exclusion from such examinations, that court, in the same opinion, affirmed defendants' convictions because defendants consented to the *in camera* examination of individual jurors and were not prejudiced. *See United States* v. *Jones*, 542 F.2d 186, 212-14, *cert. denied*, 426 U.S. 922 (1976).

Here, no direct challenge is made to the adequacy of the trial court's inquiry. Although such a challenge was made (and rejected) below, petitioners have now abandoned that argument. Nor is there a claim that petitioners were directly prejudiced by publicity during trial. Rather, petitioners claim they were prejudiced by publicity only to the extent such publicity was aggravated by in-court prosecutorial misconduct. *See Point II, infra*, at 18. Yet all claims

of prejudice (as well as all claims of prosecutorial misconduct), have been heard and rejected by the courts below. As can be easily demonstrated, the record strongly supports the conclusion that no prejudice resulted from newspaper publicity.

The transcripts of the trial court's individual, *in camera* examinations establish that the headline, "Village Riot Witnesses Vanish—D.A. Tells of Threats," was exposed in its entirety to only one juror who was shouted down by the other jurors in the middle of reading it, before he could read aloud the part about threats. Each of the jurors who candidly admitted exposure to the headline or a portion of the headline, also indicated that he or she understood the headline to be inaccurate and misleading and assured the judge that it would not affect his or her judgment of the case. Surely, neither such candor nor such sincere assurances could have been adduced had each juror, instead of being alone with the court in chambers, been confronted by nine defense attorneys and a prosecutor. Rather, as New York's Appellate Division concluded, this would have been "disruptive and harassing" (Petitioners' Appendix at 2a-3a).

Moreover, in the absence of a reference to a specific defendant accusing him of responsibility for threats against a witness or the disappearance of a witness, that defendant could not have been prejudiced. Here, the headline did not refer to any defendant by name or allege any particular act that focused attention on one or more of the nine defendants. Indeed, the jury acquitted three of nine co-defendants of all charges and acquitted another three

co-defendants of manslaughter in the first degree and conspiracy in the second degree. The care and attention with which the jury thereby evaluated the criminal liability of each defendant on related but distinct theories—conspiracy, intentional assault, felony assault (akin to felony murder) and accomplice liability—is confirmed by the number and precision of their 36 questions and by the six days it took to arrive at their verdict.

In sum, every trial is a mixture of different elements, pressures and factors. Each case must turn on its facts where appellants allege prejudice from publicity during trial. *Marshall* v. *United States*, 360 U.S. 310, 312 (1959). "A criminal trial does not unfold like a play with actors following a script; there is no scenario and can be none. The trial judge must meet situations as they arise and to do this must have broad power to cope with the complexities and contingencies inherent in the adversary process." *Geders* v. *United States*, 425 U.S. 80, 86 (1976). Here, the court twice examined each juror individually in chambers using written questions submitted by defense counsel and made transcripts of those examinations immediately available to the defense. In so doing, the trial court properly exercised its discretion and determined that no prejudice resulted from the minimal exposure of several jurors to a portion of a vague and inconsequential newspaper headline. Certiorari should not be granted to review that discretionary determination which is fully supported by the record and which has been carefully reviewed by state courts. That determination involves no issue of constitutional significance and is the subject of no conflict of authority.

POINT II

The prosecutor's alleged misconduct presents factual issues unique to this case which have been appropriately reviewed and rejected below.

Aware, perhaps, that the record refutes any claim of unconstitutional prejudice from the brief exposure of several jurors to a portion of a single newspaper headline, petitioners level a general attack at the prosecutor. The thrust of their position is that alleged acts of prosecutorial misconduct increased whatever prejudice resulted from such exposure.

Specifically, petitioners claim that the manner in which the prosecutor used grand jury minutes and other prior statements to refresh the recollection of several witnesses suggested to the jury that the witnesses gave different, more incriminating testimony before the grand jury which, due to threats and fear, they dared not repeat at trial. Petitioners also object to the prosecutor's statement, in the presence of the jury, that a number of witnesses subpoenaed by the People had not appeared, as well as to the prosecutor's objections to questions by defense counsel that sought to elicit the specific addresses of witnesses at trial. Petitioners argue that this, too, raised a spectre of fear and intimidation. Next, petitioners focus on an incident where the People moved to exclude a spectator to whom one of the witnesses had admitted speaking during a recess. They contend that the prosecutor's over-all conduct with regard to this incident suggested to the jury that the spectator was a thug present in the courtroom only for the purpose of intimidating witnesses.

The short answer to these claims is that the question of prosecutorial misconduct sufficient to deny a defendant a fair trial is primarily a factual determination raising issues that are unique to each case. The courts of New York already extend a great deal of protection to defendants from prosecutorial misconduct. The standard for reversal is "whether the conduct of the trial prosecutor so impaired the development of the factual issues and the presentation of testimony as to jeopardize the fairness of the trial." *People* v. *Alicea,* 37 N.Y.2d 601, 603 (1975). Applying this standard, New York courts have not hesitated to reverse judgments of conviction. *See, e.g. People* v. *Carter,* 40 N.Y.2d 933 (1976); *People* v. *Cruz,* 52 A.D.2d (1st Dept. 1976). No claim is made that this standard does not comport with due process. Thus, a grant of certiorari here would serve no purpose other than to undertake a factual review of a unique record.

The long answer is that these claims of prosecutorial misconduct, which are allegedly supported by petitioners' selective and slanted record citations, are entirely without foundation. They have already been refuted with resort to a point by point analysis of the full 4,000-page record filed on appeal in the courts below. Although petitioners may dispute the state courts' rejection of these claims, certiorari should not be granted merely to review the facts upon which those claims were rejected. *See United States* v. *Johnston,* 268 U.S. 220, 227 (1925).

Without engaging in the detailed analysis submitted to the state courts, it is enough to observe that the trial of this case was long and difficult. The prosecutor was

plagued by uncooperative and unreliable witnesses who either out of sympathy or fear avoided the service of subpoenas or did not obey subpoenas served upon them. It was therefore necessary to explain to the court the reasons for delay when the unavailability of a witness made it impossible for the prosecutor to proceed. It was also necessary to request appropriate relief in the form of protective orders prohibiting counsel from disclosing certain material to their clients. Notably, defense counsel never requested that these matters be discussed at the sidebar or that the press be excluded from the court. Surely, that one of these statements, properly made, ultimately came to the attention of several jurors in the form of a headline, is not a reason for granting certiorari.

In addition, the prosecutor's objections to questions directed at determining a witness's specific street address, rather than the community or neighborhood in which the witness lived, were proper because of the underlying allegations of threats against witnesses of which defense counsel were well aware.* His strenuous attempts to refresh a witness's recollection, particularly where that failure of recollection was glaring, were in good faith, based on the witness's explicit and comprehensive grand jury testimony, and did not divulge the substance of that witness's grand jury testimony. Although the prosecutor, on direct examination, made inquiry of the reluctance of several witnesses to testify, that reluctance was already obvious to the jury, or would have been, when cross-examination began. Moreover, in moving for the exclusion of a spectator who even the court noticed was acting in a manner which suggested that he was threatening a witness (2311-12), the prosecutor properly reacted because of the possibility that the spectator would be called as a witness for the People.

* Petitioners never requested the specific street addresses of prosecution witnesses on Sixth Amendment grounds. *See Smith* v. *Illinois,* 390 U.S. 129 (1968). Petitioners challenge only the prosecutor's conduct in objecting to questions aimed at eliciting that information. There is nothing in the record that suggests defense counsel would not, had they requested, been given that information under a protective order.

In sum, New York courts have already reviewed and rejected petitioners' claim of prosecutorial misconduct under a standard which safeguards petitioners' due process right to a fair trial and which New York courts have not been hesitant to apply. Consequently, no purpose would be served by this Court's undertaking to review that determination, a review which would, in any event, reach the same conclusion.

Conclusion

The petition for certiorari should be denied.

Respectfully submitted,

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